SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1247~~ 111

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, ET AL.,
Respondents.

MEMORANDUM FOR NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, ET AL.

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THE GOTTSDIER-MAHIN PRINTING COMPANY, CHICAGO

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MEMORANDUM FOR NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, ET AL.

This case and *National Woodwork Manufacturers Association, et al.* v. *National Labor Relations Board,* No. 1238, this term, pending on the Association's Petition for Certiorari, involve different but related parts of a single Board order and Court of Appeals judgment.

Respondents concur in Petitioner's statements concerning "Opinions Below" and "Jurisdiction."

QUESTIONS PRESENTED.

Respondents do not agree with certain apparent assumptions and implications of fact in Petitioner's statement of the "Question Presented." With reference to the language "traditionally performed," Respondents contend that past

practice is neither a significant nor a controlling factor in the issues of this case. However, assuming *arguendo* that such is of significance, jobsite fabrication and finishing work on "blank" doors was not "traditionally performed" work in the sense of being universal or standard practice in the Philadelphia area. About one-third of the doors shipped into the Philadelphia area by Mohawk Flush Doors, Inc., and United States Plywood Corporation were prefabricated doors (J. A.* 26, ftnt. 14).

Further, the Board's findings and the record as a whole do not support Petitioner's assumption that the *sole* objective of Rule 17 was work preservation. Even assuming *arguendo* that *a* prime purpose of Rule 17 was work preservation, the objective and means by which this was to be accomplished was the boycott of prefabricated doors.**

The Board, adopting the Trial Examiner's decision, conceded that the effect of Rule 17 "would bring about a reduction or partial cessation of business with the millwork suppliers . . ." (J. A. 26). Further, with respect to its findings of violation of Section 8(b)(4)(B), the Board stated that the Union's target and objective was clearly the manufacturers and distributors of prefabricated doors (J. A. 29). This unlawful boycott was accomplished by the enforcement of Rule 17 (J. A. 11-15). It is clear that the rule and its objectives did not change but continued the same throughout the entire period. Obviously the rule did not have solely a work-preservation objective when measured against Section 8(e) proscriptions and a boycott objective when measured against Section 8(b)(4)(B) proscriptions;

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* "J. A." refers to the Joint Appendix filed in the Court of Appeals.

** In boycott cases a lawful ultimate objective does not justify the employment of a means having an unlawful objective. *Labor Board* v. *Denver Building & Construction Trades Council*, 341 U. S. 675, 687, 689 (1951).

rather, it had both objectives at all times—one lawful and the other unlawful.

Therefore, we respectfully submit that the questions presented by the Petition would be more appropriately stated as follows:

Whether an agreement between a union and a jobsite contractor to boycott a prefabricated product manufactured elsewhere is unlawful under Section 8(e) only if the union has a dispute with the manufacturer of the product.

Whether a union objective of work preservation immunizes from the proscriptions of Section 8(e) an agreement between the union and a jobsite employer to boycott prefabricated products manufactured offsite by another employer.

Whether in the case of a jobsite agreement between a union and a contractor to boycott prefabricated products made by a manufacturer elsewhere, the affixation of "primary" and "secondary" labels to the relations involved is necessary and determinative of violation of Section 8(e).

STATEMENT.

Respondents take no substantial exception to Petitioner's "Statement."*

REASONS FOR GRANTING WRIT.

Respondents submit that the Court's decision below that the union-employer agreement embodied in Union Rule 17 violated Section 8(e) is correct. We disagree with Petitioner's argument on the merits to the contrary and believe that the correctness of the decision below can be demon-

* However, attention is invited to the fact that the terminology "hot cargo" on page 4 and "primary" and "secondary" on page 5 of the Petition is that of Petitioner—and not that employed by the Court or the Board below in dealing with the Section 8(e) violation.

strated to the satisfaction of the Court if certiorari is granted.

Petitioner errs in its employment of "hot cargo" as a term of art in a way which unduly limits the intended scope and effect of Section 8(e). Further, Petitioner erroneously argues that employer-union agreements to boycott the prefabricated products of others are lawful under Section 8(e) in the absence of a dispute between the union and the manufacturer of the prefabricated products.

With respect to Petitioner's contention regarding decisional conflicts at page 8 of the Petition, Respondents submit that the cases cited in footnote 11 are not directly or necessarily in conflict with the Court's decision below. These cases involved the subcontracting or assignment of work as such. They involved work to be performed locally at, or directly in connection with, the employer's operation and within the union's jurisdiction—i.e., a jurisdictional division among different unions of work actually performed in a local job or operation. These work-assignment cases cannot properly be applied to justify the product boycotts dictated by Rule 17 in the instant case. We have here a purchase of products—and not an assignment of work. The clear target of Rule 17 was the banning of prefabricated products manufactured by other employers at distant locations remote from the Philadelphia jobs and the Union's jurisdictional area.*

The reasoning by which the Court in *Houston Insulation Contractors Association* v. *NLRB* (5th Cir., March 9, 1966) (Petition, pp. 8 and 39), found no violation of Section 8(e) would appear to conflict, in principle at least, with the decision below. We submit that the Fifth Circuit's treatment of the purchase of prefabricated products as an assignment

* The manufacturers and distributors whose products were boycotted in this case only manufacture and distribute products. They do not perform or engage in any construction work whatever.

or subcontracting of work and its statement that Section 8(e) does not apply in the absence of a dispute between the union and the maker of the boycotted products are erroneous and unduly limit the intended scope and effect of Section 8(e).

As stated, the questions presented herein with reference to Section 8(e) are closely related to the questions presented in Respondents' own Petition for Certiorari* to review the decision of the Court below with respect to certain of its Section 8(b)(4)(B) findings. These statutory provisions are *in pari materia*, and the interpretation to be accorded them is of substantial importance to the unions and industries involved and in the administration of the Act.

Therefore, if certiorari is granted in Cause No. 1238, we respectfully suggest that the interests of justice would be served by the Court's also granting certiorari in this Cause No. 1247 and deciding both of the important related issues presented.

Respectfully submitted,

CHARLES B. MAHIN,
Counsel for Respondents.

May 20, 1966.

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* *National Woodwork Manufacturers Association, et al.* v. *NLRB*, No. 1238.